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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977
NO. 77-738

RICHARD J. STULL,

Petitioner,

-against-

NICHOLAS H. BAYARD, PAUL L. MILLER, HOWARD PIPER, THOMAS F. PIPER and WILLIAM T. PIPER, JR., individually, and as Executors of the Estate of WILLIAM T. PIPER, Deceased, NICHOLAS H. SALGO, DAVID W. WALLACE, BANGOR PUNTA CORPORATION and THE FIRST BOSTON CORPORATION,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

IRVING BIZAR
Attorney for Petitioner
40 West 57th Street
New York, New York 10019

(6858)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

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Petitioner submits this reply brief to correct a major misstatement and distortion of the Record.

1. At the outset, this Court should note that respondents do not challenge any of the arguments petitioner has advanced with respect to his contention that the cause of action did not accrue until August 4, 1969.

Respondents' argument that petitioner is time barred under New York law is thus irrelevant.

Moreover, Petitioner contends that the applicable New York statute of limitation was tolled under the doctrine of American Pipe & Construction Co. v. Utah, 414 U.S. 538. Under the Supremacy Clause of the United States Constitution, state law must yield in this case.

2. Respondents erroneously argue that "[p]etitioner had actual notice that class status was denied and could have moved promptly to intervene..." (R. B., Page

5)* The argument is both factually and legally incorrect.

Petitioner had no hearing below; the motion was decided on affidavits alone. Petitioner contended below that he had no notice. When class status was initially denied for Lillian Stull, petitioner withdrew as counsel and new counsel was substituted in his place. New counsel then promptly renewed the motion for class determination and appealed from the original denial of class status. Petitioner took no part in the further litigation that ensued. He did not know of the withdrawal of the renewal of class motion nor of the dismissal of the appeal. His first notice** as

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* "R. B." refers to respondents' brief.

** No notice was directed to be sent to the putative class members when Lillian's attempt to renew the motion for class determination was withdrawn.

to disposition was the attempt by respondents during settlement negotiations and discussions before the Magistrate to whom the matter had been assigned to have him sign a release. At that time he refused and indicated that he would start a class action, which he promptly did - prior to the settlement of Lillian's action. Respondents did not dispute this below nor do they do so now. In the absence of an evidentiary hearing, these facts must be accepted as true.

Nothing in American Pipe & Construction Co. v. Utah, supra, suggests that to obtain the benefit of the tolling doctrine enunciated therein, one must intervene promptly. Indeed, in United Airlines, Inc. v. McDonald, ___ U.S. ___, 97 S.Ct. 2464 (1977), this Court permitted intervention after final judgment in a litigation pending for five years in order to prosecute

an appeal from an initial denial of class determination. This Court recognized that "prompt" intervention for the purpose of pressing class questions was not a requirement of American Pipe.

Furthermore, respondents' argument makes no logical sense. If the tolling doctrine of American Pipe applies, then the New York statute of limitation must have been deemed to stop running for approximately twenty-three months. The New York statute began to run again after denial of class in Lillian's action, and petitioner must be given "credit" for the twenty-three months. If that be so, then it did not matter when in the succeeding twenty-three months he commenced his action; his suit was timely because of the aforesaid tolling for twenty-three months.

Conclusion

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: December 27, 1977.

Respectfully submitted,

IRVING BIZAR
Attorney for Petitioner
40 West 57th Street
New York, New York 10019